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EXPUNGEMENT OF ARREST RECORDS: THE NEED FOR FEDERAL LEGISLATION

This note considers the need for federal legislation which would require governmental law enforcement agencies to expunge the criminal records[1] of persons who are arrested but not ultimately convicted.[2] The Supreme Court of the United States has never addressed the issue of expungement of criminal records. The federal and state courts have been inconsistent in handling cases on the subject and both have called upon Congress or the legislatures to resolve the issue.[3] Congress has never answered the call and until recently most state legislatures have failed to pass legislation.

The results of this governmental inactivity have become apparent in the chilling effect of an arrest record on employment opportunities. There has been an average of approximately 6 million adult arrests each year in the past three years. Approximately 40% of these resulted in no conviction.[4] This burden falls especially hard on minorities, who, because of socio-economic factors, are most likely to have an arrest record. At a time when government is declaring all out war on minority discrimination, the maintenance and dissemination of records of arrests which do not result in conviction perpetuate discrimination in employment, law enforcement, and licensing.

This note takes the position that the only method of countering these harmful effects is to return to the fundamental principle of American justice; *i.e.*, the presumption of innocence. "The principle that there is a presumption of innocence in favor of the accused is the undoubted law, axiomatic and elementary, and its enforcement lies at the foundation of the administration of our criminal law."[5] Expungement provides concrete substance for the presumption of innocence and ensures that the moral force of the criminal law not be diluted by a standard of proof that leaves people in doubt whether innocent men are guilty. Therefore, federal legislation is needed to provide uniformity in state expungement statutes, to close loopholes in existing legislation, and to fill the void left in those states still lacking such legislation. Analysis of this legislation requires a sensitive balancing of the needs of governmental law enforcement agencies with the individual's constitutional rights, employment

1. The terms "criminal record" and "arrest record" are used interchangeably because an arrest not resulting in conviction and an arrest resulting in conviction are both listed on the same master "rap sheet" in the computerized criminal history data banks of the federal, state, and local law enforcement agencies. When inquiries are made regarding a subject's "criminal record" the computerized printout response reflects all arrests regardless of the eventual disposition or lack of disposition information.
2. The scope of this note is limited to adult arrest records and does not attend to the shortcomings of current juvenile expungement statutes.
3. *See* United States v. Singleton, 442 F. Supp. 722, 724 (S.D. Tex. 1977).
4. Federal Bureau of Investigation, Crime in the United States, 1977, Uniform Crime Reports (1978). Annual arrest figures, however, do not measure the actual number of individuals arrested since one person may be arrested several times during the year for the same or different offenses. Further statistics show that 40% of the male population will acquire a non-traffic arrest at some point in their lives, with the percentage for Black urban males soaring to 90%. President's Committee on Law Enforcement and Administration of Justice Report, The Challenge of Crime in a Free Society 237 (1967).
5. Coffin v. United States, 156 U.S. 432, 453 (1895). *See also* Taylor v. Kentucky, 436 U.S. 478 (1978); Estelle v. Williams, 425 U.S. 501 (1976); *In Re* Winship, 397 U.S. 358 (1970) on the subject of the presumption of innocence.

opportunities and reputation. To that end, the present uses of these arrest records will be scrutinized together with their economic, social and legal effects on the exonerated arrestee. This analysis will then be the basis for suggesting key elements to be included in future expungement legislation.

BACKGROUND: THE ADMINISTRATION OF CRIMINAL ARREST RECORD SYSTEMS

Criminal records, which include arrest records not resulting in conviction, are collected in all 50 states, in most cities, and by the federal government. They are usually stored and maintained in computer systems at each respective level.[6] At the federal level, the U.S. Attorney General is authorized to "acquire, collect, classify and preserve identification, criminal identification, crime *and other records:* and exchange these records with, and for the official use of authorized officials of the federal government, the states, cities and penal and other institutions."[7] (emphasis added). An implementing regulation delegates this authority to the Director of the Federal Bureau of Investigation (F.B.I.).[8]

Currently the F.B.I. has "criminal" records on approximately 23 million individuals.[9] An average of 13,000 fingerprint cards of persons arrested come in daily to the Bureau. The Bureau's Identification Division (Ident) is the central repository of arrest records for all federal, state and local law enforcement agencies. In addition, Ident contains non-criminal fingerprint records of persons seeking employment or licensing in the various state and federal positions requiring fingerprint checks.[10] There are approximately 15,000 authorized non-law enforcement recipients of F.B.I arrest records.

The director of the Bureau sets the policies controlling Ident subject to review by the Attorney General.[11] In its relationship with the states, the Bureau considers the records of the contributing state or local agency to be the property of that agency.[12] In contracting with these contributing agencies, the Bureau disclaims responsibility for misinformation, lack of dispositions and unlawful dissemination.[13] The arresting agency exercises discretion as to which arrest records are sent to Ident, so long as they fall within the general standards set by the Bureau. For example, the Bureau considers disorderly conduct, vagrancy, loitering, traffic offenses (other than driving while intoxicated) and juvenile offenses as non-serious and therefore unacceptable.[14] In areas not addressed by the Bureau's regulations, the states are afforded discretion to

6. The fingerprint cards and photographs ("mug shots") are kept in manual files, while a notation of the arrest indicating the contributor of the fingerprints (arresting police), the arrestee's name, date of arrest, the charge, and disposition are placed on a computerized master "rap sheet". This system is followed in nearly all states and most large cities.
7. 28 U.S.C. § 534(a) (1970).
8. 28 C.F.R. § 0.85(b) (1975).
9. The F.B.I. statistics hereafter, unless otherwise indicated, are the result of an interview with Special Agent James W. Hoffman, Project Manager, Computerized Criminal History Program, at F.B.I. Headquarters, Washington D.C. (October 1978).
10. For a brief summary of positions requiring F.B.I. criminal record checks see the appendix following Menard v. Mitchell, 328 F. Supp. 718, 728 (D.D.C. 1971). *See also* Exec. Order No. 10,450, *reprinted in* 5 U.S.C. § 7311 (1953), requiring an F.B.I. criminal record check on all prospective federal employees.
11. 28 C.F.R. § 0.85 (1975).
12. 28 C.F.R. § 20.31 (1976).
13. 28 C.F.R. § 20.31 (1976).
14. 28 C.F.R. § 20.32 (1975).

determine the seriousness of the arrest. Some state and local agencies consider prostitution, adultery and homosexuality serious offenses and these arrests are maintained in Ident.

The F.B.I. also has a relatively new criminal records computer which is separate from Ident. The Computerized Criminal History (C.C.H.) system was created in 1971 to facilitate rapid exchange of criminal records among the states. Overseeing the C.C.H. operation is the National Crime Information Center Policy Board composed of 26 members of the criminal justice community. Currently, the C.C.H. system has only twelve states participating.[15] Low participation can be attributed to the fact that C.C.H. is basically the same service provided by Ident, although in some respects a faster and more efficient system. Thus, most of the states use Ident to avoid incurring costs for essentially the same service.

On the state and local level, each law enforcement agency has virtually the same system as the F.B.I. for maintaining criminal records, with almost every state having computers for storing this data. Since these systems are funded wholly or in part by federal funds, certain rules governing access and dissemination are required to be followed.[16]

Since there is no federal expungement statute, the F.B.I. will expunge a criminal record and return all accompanying identification data (fingerprints and photographs) only if it is requested by the contributing (arresting) agency or if it receives a court order requiring it to do so. The state and local police also will expunge arrest records only if there is a statute requiring expungement or if required to do so by court order.

Most state statutes have various conditions that must be met before expungement of the exonerated arrestee's record is permitted. Some examples are: no prior convictions, no prior arrests, no availability if exclusionary rule applied. Also, most of the statutes provide for "sealing" the arrest record, *i.e.*, making it legally available to law enforcement only. In summary, some state legislatures have just begun in the past few years to recognize the failure of society to distinguish an arrest record from a conviction record and have passed rudimentary expungement statutes. These statutes define "expungement" in a variety of ways, including; annulment of a conviction, sealing, restricting dissemination, and placing a notation of the disposition on the record. (A survey of state expungement statutes can be found in the appendix to this note.)

JUDICIAL RESPONSE

The Supreme Court of the United States has never decided an expungement case, and lower federal and state courts have been inconsistent in handling the expungement issue. Case law in this area can be classified into four categories:

15. As of January, 1979, the states participating in the C.C.H. program were: Arizona, California, Florida, Illinois, Michigan, Minnesota, Nebraska, North Carolina, Ohio, South Carolina, Texas, and Virginia.
16. 42 U.S.C. § 3771(b) and (c) (1973); 28 C.F.R. § 20.25 (1976); 28 C.F.R. § 20.33(4)(b) (1976); 28 C.F.R. § 20.38 (1976); Privacy Act of 1974, Pub. L. No. 93-579 (1974).

(1) Decisions holding that the problem should be resolved by Congress or the legislature, and refusing to expunge without authorizing statute.[17]
(2) Decisions in which the courts deny any judicial expungement power, but restrain dissemination of arrest records.[18]
(3) Decisions which allow expungement only in extreme circumstances, *e.g.*, arrest involving gross police misconduct or without probable cause.[19]
(4) Decisions which permit expungement regardless of legislative inaction or absence of special circumstances.[20]

In the first category the leading cases were handed down by the California courts in *Sterling v. City of Oakland*[21] and *Loder v. Municipal Court.*[22] In *Sterling,* a woman was the victim of an erroneous citizen's arrest. After the charges were dismissed and after a successful false arrest suit, Ms. Sterling brought suit for expungement of her arrest record. The court of appeals affirmed the lower court's decision to deny expungement, stating, "We base our decision chiefly upon the omission of the Legislature of this state to prescribe any duty to return photographs or fingerprints, . . . but we find some support for the judgment in the decisions of other states."[23] While legislative omission was the primary reason for the holding, three other grounds were given as support for the decision:

a) That existing statutes were sufficient to protect an exonerated arrestee by insuring that the eventual disposition of the case is made part of the actual record and limiting access to such reports;
b) That the existence of an arrest record would not adversely affect the arrestee; and
c) That any invasion of the arrestee's right of privacy caused by maintaining such records was insignificant.

Fourteen years after *Sterling,* the California Supreme Court re-examined the expungement issue in *Loder v. Municipal Court.*[24] Though faced with new constitutional challenges such as the right of privacy, the court denied expungement on the same grounds as in *Sterling.* The court stated that the right of privacy of an unconvicted arrestee under the California and United States Constitutions is outweighed by a compelling state interest in the retention and dissemination of arrest records in "the promotion of more efficient law

17. United States v. Singleton, 442 F. Supp. 722 (S.D. Tex. 1977); Hammons v. Scott, 423 F. Supp. 625 (N.D. Cal. 1976); Rowlett v. Fairfax, 446 F. Supp. 186 (W.D. Mo. 1978); Loder v. Municipal Court, 17 Cal, 3d 859, 553 P.2d 624 (1976), *cert. denied,* 429 U.S. 1109 (1977); Herschel v. Dyra, 365 F.2d 17 (7th Cir.), *cert. denied,* 385 U.S. 973 (1966); Sterling v. City of Oakland, 208 Cal. App. 2d 1, 24 Cal. Rptr. 696 (1962).
18. Menard v. Mitchell, 328 F. Supp. 718 (D.D.C. 1971); Utz v. Cullinane, 520 F.2d 467 (D.C. Cir. 1975); Tarlton v. Saxbe, 407 F. Supp. 1083 (D.D.C. 1976).
19. United States v. McLeod, 385 F.2d 734 (5th Cir. 1967); Wilson v. Webster, 467 F.2d 1282 (9th Cir. 1972); Hughes v. Rizzo, 282 F. Supp. 881 (E.D. Pa. 1968); Washington Mobilization Committee v. Cullinane, 566 F.2d 107 (D.C. Cir. 1977); United States v. Linn, 513 F.2d 925 (10th Cir. 1975); Bromley v. Crisp, 561 F.2d 1251 (10th Cir. 1977); Coleman v. United States Dep't of Justice, 429 F. Supp. 411 (N.D. Ind. 1977); Davis v. Mississippi, 394 U.S. 721 (1969).
20. Menard v. Saxbe, 498 F.2d 1017 (D.C. Cir. 1974); Eddy v. Moore, 5 Wash. App. 334, 487 P.2d 211 (1971); United States v. Kalish, 271 F. Supp. 968 (D.C.P.R. 1967).
21. 208 Cal. App. 2d 1, 24 Cal. Rptr. 696 (1962).
22. 17 Cal. 3d 859, 553 P.2d 624 (1976), *cert. denied,* 429 U.S. 1109 (1977).
23. 208 Cal. App. 2d at 4.
24. 17 Cal. 3d 859, 553 P.2d 624 (1976), *cert. denied,* 429 U.S. 1109 (1977).

enforcement and criminal justice; more specifically, the state's purpose is to protect the public from recidivist offenders."[25] The court also felt that California had adequate legislation protecting the privacy of exonerated arrestees from adverse uses of their arrest records.

Finally, the court said that it was unlawful under California law to destroy or remove an arrest record and that it was powerless to do so because such power is vested only in the legislature. Ironically, the court also noted that the California Department of Justice had implemented an expungement program providing for destruction of these records (without any authority to do so from the legislature).

The second category of cases which denies expungement power but restrains dissemination, has been rendered a virtual nullity by recent decisions[26] interpreting the Supreme Court of the United States decision in *Paul v. Davis*[27], though *Paul* dealt with neither expungement nor arrest records. In *Paul,* the defendant, who had never been convicted of a crime, was arrested for shoplifting and the charges were subsequently dismissed. In the meantime, the police published a pamphlet to over 1000 stores containing Davis' name and photograph along with others and labeled them as "active shoplifters." The Court held that though Davis had a cause of action for defamation against the state, the distribution of the pamphlet was not an infringement on Davis' constitutional rights, and that reputation involved neither a liberty nor property interest protected by due process of the fifth or fourteenth amendments. Likewise, any claim of defamation in *Paul* could not be asserted under 42 U.S.C. § 1983. Finally, the Court also rejected a claim that distribution of the pamphlet infringed the defendant's constitutional right of privacy.[28] The Court in *Paul* did not address the issue of arrest records or expungement, but as noted above, three lower court decisions have interpreted *Paul* to extend to arrest records.

The third category of cases,—allowing expungement only in extreme circumstances, such as arrests involving gross police misconduct or arrests without probable cause—represents the current position taken by most federal courts. "The power of the courts to order expungement of an arrest record is a narrow one, [which] should not be routinely used whenever a criminal prosecution ends in acquittal, but should be reserved for the unusual or extreme case."[29]

The last category of cases permits expungement regardless of legislative inaction or absence of special circumstances. The leading case in this area is *Menard v. Saxbe,*[30] in which Dale Menard, a 19 year old student, was arrested for suspicion of burglary in Los Angeles. The Los Angeles police sent copies of his fingerprint cards and other arrest data to the California State Bureau of Criminal Identification and to the F.B.I. After charges were withdrawn the

25. *Id.* at 628.
26. Rowlett v. Fairfax, 446 F. Supp. 186 (W.D. Mo. 1978); Hammons v. Scott, 423 F. Supp. 618 (N.D. Cal. 1976); Loder v. Municipal Court, 17 Cal 3d 859, 553 P.2d 624 (1976), *cert. denied,* 429 U.S. 1109 (1977).
27. 424 U.S. 693 (1976).
28. *Id. at 714.*
29. United States v. Linn, 513 F.2d 925 (10th Cir. 1975).
30. Menard v. Mitchell, 430 F.2d 486 (D.C. Cir. 1970), 328 F. Supp. 718 (D.D.C. 1971); Menard v. Saxbe, 498 F.2d 1017 (D.C. Cir. 1974).

Los Angeles Police Department notified these same agencies of Menard's release. The disposition column of his newly-acquired permanent criminal record with local, state, and federal agencies stated, "Unable to connect with any felony or misdemeanor at this time."

Menard (with the aid of the American Civil Liberties Union) brought suit to expunge the arrest record or to restrict its dissemination. The federal district court ruled that because there was probable cause for Menard's arrest,[31] it could not order expungement of the arrest record. The court did, however, enjoin dissemination of the F.B.I. criminal records to anyone but law enforcement or government agencies.[32]

Menard appealed the decision in an effort to obtain expungement. The Court of Appeals for the District of Columbia ruled that Menard's arrest had been a "detention" and not an arrest, therefore, any record of the encounter could not be included in F.B.I. criminal files,[33] and ordered expungement of Menard's record.

In summarizing these four categories it is obvious that expungement has not made progress through judicial determinations. Most of the holdings call for legislative action to strike the delicate balance between law enforcement needs for such data and the rights of the exonerated arrestee.

ADVERSE USES AND EFFECTS OF AN ARREST RECORD

Employment

The most prominent study of the deleterious effect of an arrest record on a prospective employee is entitled *Report of the Committee to Investigate the Effects of Police Arrest Records on Unemployment in the District of Columbia (1967),* commonly referred to as the *Duncan Report.* The *Duncan Report* found that use of arrest records by prospective employers was widespread and the consequences of a person having been arrested, even if the charges were subsequently dismissed, were severe. Most employers could not discern that several notations really related to one arrest. Others did not understand the disposition. The *Duncan Report* also noted that 60% to 90% of the male working population in some predominantly black areas of the District of Columbia were systematically excluded from between 25% to 50% of the jobs available to them in relation to their skills because of records of arrests without convictions. There was a similar effect on a person's chances for government employment, and for obtaining some city licenses and permits.

31. 328 F. Supp. 718, 723 (D.D.C. 1971). A recent federal case, however, mistakenly read the *Menard* court as ruling that there was no probable cause for Menard's arrest. The court then denied expungement based on this faulty premise. Coleman v. United States Dep't of Justice, 429 F. Supp. 411, 412-413 (N.D. Ind. 1977).
32. 328 F. Supp. 718, 728 (D.D.C. 1971). This injunction was quickly overruled legislatively when Senator Bible of Nevada, worried about the inability of casino operators in Las Vegas to run F.B.I. checks on prospective employees, sponsored a rider to the F.B.I. criminal records for employment and licensing purposes when authorized by state or local statute. *See* Act of Dec. 15, 1971, Pub. L. No. 92-184, 85 Stat. 642 (1971); Act of Oct. 25, 1972, Pub. L. No. 92-544, 86 Stat. 1109 (1972).
33. 498 F.2d 1017 (D.C. Cir. 1974).

Further evidence of the attitude of employers against hiring exonerated arrestees is found in Miller's study, *The Closed Door: The Effect of a Criminal Record on Employment with State and Local Agencies.*[34] This 1972 study indicated that 77% of the job application forms for state or local civil service asked about arrests. Twenty percent of the responding agencies said that an arrest record without a conviction was grounds for not hiring.[35]

Another study showed that approximately 75% of the New York City area employment agencies sampled did not refer an applicant with a record, regardless of whether the arrest was followed by a conviction.[36] In another study,[37] two-thirds of the employers surveyed would not consider employing a man acquitted of assault charges, even for the lowest level of unskilled positions. Another study discussed the hiring of extra postal workers during the Christmas season. The Postmaster of San Francisco revealed that one of his criteria was "We don't want to be bothered with anybody who has a record of arrest."[38] An article entitled *The Expungement Myth*[39] candidly pointed out most employers' attitude that exonerated arrestees probably "got off on some technical loophole."[39]

When the state of New York passed a statute requiring all employees of security firms to be fingerprinted for security check, several hundred employees were found to have "criminal records" and dismissed from their employment. Half of those fired had only records of arrest not resulting in conviction.[40]

The lack of dispositions on arrest records also hurts the exonerated arrestee seeking employment. Such lack of vital data makes it appear that the prospective employee is "still in trouble with the law." If an employer can find someone not bothered by what appears to be pending criminal legal action he will certainly choose him over the exonerated arrestee. As the Colorado Supreme Court noted in *Davidson v. Dill,* when two or more applicants apply for the same job, those with previous arrest records, "clearly stand in a less favorable position than do other applicants."[41]

Those injured most by arrest records in the area of employment are minorities. One of the most controversial cases touching upon the issue of minorities with arrest records being barred from employment is *Gregory v. Litton Systems.*[42] In *Gregory,* the district court held that employers violated Title VII of the Civil Rights Act of 1964[43] by denying employment to persons with arrest records. The court made factual findings that such a practice in effect disqualified a higher proportion of blacks than whites. The court stated:

> There is no evidence to support a claim that persons who have suffered no criminal convictions but have been arrested on a number of occasions can be expected, when employed, to perform less efficiently or less honestly than other employees . . . . Thus, information concerning a prospective employee's record of arrests without convictions is irrelevent to his suitability or qualifications for employment.[44]

34. Miller, *The Closed Door: The Effect of a Criminal Record on Employment with Local Agencies,* Georgetown University Law Institute (1972).
35. *Id.* at 34.
36. The President's Commission on Law Enforcement and Administration of Justice Report: The Challenge of Crime in a Free Society 75 (1967).
37. Schwartz & Skolnick, *Two Studies of Legal Stigma,* 10 Soc. Prob. 133, 136 (1962).
38. *Hearings Before the California Assembly Comm. on Criminal Procedure* (June 10, 1964).
39. 38 Los Angeles Bar Bulletin 161 (1963).
40. N.Y. Times, Feb. 5, 1970, at § 1, at 1, col. 2; Wall St. J., Feb. 5, 1970, at 17, col. 1.
41. 503 P.2d 157, 159 (1972).
42. 316 F. Supp. 401 (C.D. Cal. 1970), *modified,* 472 F.2d 631 (9th Cir. 1972).
43. 42 U.S.C. § 2000(e), *et seq.* (1964).
44. 316 F. Supp. 401, 402-403 (C.D. Cal. 1970).

Three decisions by the Equal Employment Opportunity Commission have held that asking blacks about arrest records or minor convictions is discriminatory *per se.*[45] Although these cases apply directly to private employers, they do not protect the exonerated arrestee. For an employer may bypass the purpose of the holding in *Gregory* simply by requesting felony conviction information. Such a request will result in the employer receiving a complete rap sheet from the F.B.I., regardless of whether the employee has a felony conviction. Also, many employers are statutorily authorized to receive criminal records or to condition employment on a waiver by the applicant of any statutes prohibiting dissemination. If the arrests are the true grounds for rejection there is a heavy burden on the arrestee to prove that the mere fact of a prior arrest was the actual reason for rejection. The root of the problem in enforcing the spirit of *Gregory* was noted in *Utz v. Cullinane,*[46]

> If it is illegal for employers (including state and local government employers who are within the ambit of Title VII) to utilize arrest records not culminating in convictions to deny an individual opportunities open to those with no such record, it would appear to be just as illegal for the government to furnish the employer with the information on which such illegal actions may be based, at least when there is no legitimate law enforcement justification for providing the employer with the data.

The court added,

> If a governmental unit discriminates in employment through the utilization of arrest records the rights it would be abridging would be constitutional rights; the private sector employer, on the other hand is only prevented from discrimating because of Congressional action. Nevertheless, where government action facilitates private discrimation, constitutional strictures should apply.[47]

Reputation

In addition to employment considerations, advocates of expungement espouse the right of an exonerated arrestee to be free from injury to his reputation. In that context, maintenance and dissemination of arrest records not resulting in conviction may state a cause of action in tort for defamation or invasion of privacy.[48] When one of the 15,000 private or public agencies authorized to receive F.B.I. criminal records, or thousands of other authorized recipients (*e.g.,* state Bar Associations) of state and local arrest records,[49] requests an applicant's "criminal record," the F.B.I. or State Criminal Identification Bureau forwards from their computerized "criminal history" data bank the "rap sheet" or "criminal history." At common law, the labeling of a person as a "criminal" was defamation *per se.*[50] The effect of unconsented distribution of an arrest citation as a "criminal record" is similar to that of defamation, *i.e.,* to

45. Decision No. 71-1950, EPD § 6274 (Apr. 29, 1971); Decision No. 71-2089, EPD § 6253 (May 19, 1973); Decision No. 71-2682, EPD § 6288 (June 28, 1971).
46. 520 F.2d 467 (D.C. Cir. 1975).
47. *Id.* at 482. *See also* N.A.A.C.P. v. Alabama, 357 U.S. 449 (1958).
48. In Paul v. Davis, 424 U.S. 693 (1976), discussed earlier, Justice Rehnquist rejected privacy and defamation claims based upon constitutional rights but expressly stated that the state could be sued in tort.
49. *See* Menard v. Mitchell, 328 F. Supp. 718, 728 (D.C. Cir. 1971).
50. Hanson v. Krehbiel, 68 Kan. 670, 75 P. 1041 (1904); Brewer v. Chare, 121 Mich. 526, 80 N.W. 575 (1899).

damage the reputation of the citizen in his community, especially in his dealings with employers.[51] The designation of a mere arrest record as a "criminal record" or a "criminal history" is contrary to fact and arguably beyond the scope of the F.B.I.'s statutory authority to collect criminal records.[52]

On the basis of the legislative history of the Act authorizing the F.B.I. to maintain and disseminate arrest records,[53] the Act can be construed not to include arrest records which do not result in conviction within its ambit. This initial statutory authorization, subsequently repealed, was limited to the acquisition and preservation of "criminal identification and other crime records."[54] The present Act states that: "The legislative purpose in enacting sections 1-6 of this Act is to restate, without substantive change, the laws replaced by those sections of the effective date of this Act."[55] Apparently under the clause, "and other records", the F.B.I. is allowed to keep an exonerated arrestee's records with criminal records. Such an interpretation creates a substantive change from the repealed statute, contrary to the stated legislative intent.

Privacy

An individual's right to protect his reputation is concomitant with his right of privacy. There are at least three types of invasion of privacy[56] in which an unconvicted arrestee might find a cause of action against a law enforcement agency for exposure of his arrest record, whether as an arrest record or a "criminal" record:

(1) Intrusion upon plaintiff's seclusion or solitude, or into his private affairs;
(2) Public disclosure of private embarrassing facts; and
(3) Publicity places plaintiff in false light in public eye.

It may be a violation of privacy to place one in a false light in the public eye when there is inclusion of plaintiff's name, photograph, and fingerprints in a public gallery of convicted criminals when in fact one has not been convicted. "Although the police are clearly privileged to make such a record in the first instance, and to use it for only legitimate purposes pending trial, or even after a conviction, the element of false publicity in the inclusion among the convicted goes beyond the privilege."[57] Going one step further, there may be an affirmative duty to remove a libelous publication made by another.[58] Thus, there is a direct correlation between the loss of individual privacy and retention of arrest records.[59]

51. "A communication is defamatory if it tends so to harm him in the estimation of the community or to deter third persons from associating or dealing with him." Restatement of Torts § 559 (1938).
52. *Cf.* Joint Anti-Fascist Comm. v. McGrath, 341 U.S. 123 (1950); Wisconsin v. Constantineau, 400 U.S. 433 (1971). (In these cases the Court used similar reasoning.)
53. Department of Justice Appropriations Act of 1968, 28 U.S.C. § 534(a) (1970).
54. Department of Justice Appropriations Act of 1965, 5 U.S.C. § 340 (1965) (repealed, 1966).
55. Department of Justice Appropriations Act of 1968, 28 U.S.C. § 7(a) (1970).
56. Prosser, *Privacy*, 49 Cal. L. Rev. 383 (1960).
57. *Id.* at 399-400.
58. Prosser & Wade, Torts 873 (5th ed. 1971).
59. United States v. Kalish, 271 F. Supp. 968 (D.C.P.R. 1967) examines this correlation.

One court of appeals followed this reasoning when it stated:

> When arrested, an accused does not have a constitutional right of privacy that outweighs the necessity of protecting society and the accumulation of this data, no matter how mistaken the arrest may have been. However, when an accused is acquitted of the crime or when he is discharged without conviction, no public good is accomplished by the retention of criminal identification records. On the other hand, a great imposition is placed upon the citizen. His privacy and personal dignity is invaded as long as the Justice Department retains "criminal" identification records, "criminal" arrest, fingerprints and a rogue's gallery photograph.[60]

Other Consequences

In addition to the detrimental effects an arrest record has on an exonerated arrestee's employment prospects, reputation, and privacy, there are personal and psychological consequences as well. He will be subjected to scrutiny not only in employment but also in applying for a license,[61] schooling,[62] and by the police. His ability to secure credit[63] is hampered by the listing of an arrest at the credit bureau. The arrestee's decision to take the witness stand in his own defense in a criminal case or as a witness or party in a civil or criminal case, will be made with extreme caution for fear of "opening the door" and involving his character in the issues, thereby subjecting his arrests to exposure.[64] Psychological studies have indicated that once an individual is labeled a "criminal," he begins to assume the role attributed to him.[65] One author has stated:

> When he is effectively ostracized, the criminal has only two alternatives: he may associate with other criminals, among whom he can find prestige, and means of further criminality; or he may become disorganized, psychopathic, or unstable. Our current practice is to permit almost all criminals to return to society, in a physical sense, but to hold them off, make them keep their distance, segregate them in the midst of the ordinary community.[66]

Another study suggested that police records play a determinative role in the process by which the marginal delinquent matures into the role of a confirmed recidivist.[67] Examples of this labeling can be found in statutes and court cases dealing with expungement. For example, in Florida, the expungement statute is entitled the *First Offenders Act.*[68] The New Mexico statute, which prohibits dissemination of non-conviction data to licensing boards and public and private

60. *Id.* at 970.
61. McAvoy v. La. St. Bd. of Medical Examiners, 238 La. 502, 115 So. 833 (1959).
62. Due v. Florida A. & M., 233 F. Supp. 396 (N.D. Fla. 1963).
63. Fite v. Retail Credit Co., 386 F. Supp. 1046 (D. Mont. 1975). In Fite, the court allowed full disclosure of juvenile arrest records to a credit bureau. For other discussions involving arrest records and credit bureaus see V. Packard, The Naked Society 54 (1964); Note, *Arrest and Credit Records: Can the Right of Privacy Survive?*, 24 U. Fla. L. Rev. 681 (1972).
64. Fed. R. Evid. 404, 405.
65. Some sources on the labeling theory are: V. Eisner, The Deliquency Label (1969); E. Lemert, Social Pathology (1951); Payne, *Negative Labels: Passageways and Prisons*, 19 Crime & Deliquency 33 (1973).
66. E. Sutherland & D. Cressy, Principles of Criminology 354 (8th ed. 1970). Failure to restrict dissemination disregards the individual's psychological interest in preventing disclosure of personal information and undermines the basic concepts of intimacy, role playing and autonomy. *See* Project, *The Computerization of Government Files: What Impact on the Individual?* 15 U.C.L.A. L. Rev. 1371, 1411-25 (1968).
67. Gold & Williams, *National Study of the Aftermath of Apprehension*, 3 U. Mich. J.L. Ref. 3 (1969).
68. Fla. Stat. Ann. § 901.33 (West 1977).

employers, is called *The Criminal Offender Employment Act.*[69] In judicial decisions such as *Loder*[70], discussed previously, many references are made to the exonerated arrestees as "offenders". An example of this can be found in the *Loder* court's holding that there is a compelling state interest in the retention and dissemination of arrest records in "the promotion of more efficient law enforcement and criminal justice; more specifically, the state's purpose is to protect the public from recidivist offenders."[71] The *Loder* court compounded their labeling when it found that in utilizing arrest records, "in certain circumstances a pattern may emerge showing modus operandi – which has independent significance as a basis for suspecting the arrestee if the crime is committed again."[72]

Perhaps the most perplexing adverse use of arrest records occurs within the criminal justice system itself. Judges, prosecutors, and police, who are legally trained in interpreting arrest records and who are constitutionally bound to interpret them by the presumption of innocence standard, have often used the presumption of guilt standard. On the one hand, judges use strong language in denouncing the value of arrest records not resulting in conviction. For example, in *United States v. Dooley,* the court said,

> [C]harges resulting in acquittal clearly have no legitimate significance. Likewise, other charges which the government fails or refuses to press or which it withdraws are entitled to no greater legitimacy. They lose any tendency to show probable cause and should not be bootstrapped into any unearned and undeserved significance. Actually, a collection of dismissed, abandoned or withdrawn arrest records are no more than gutter rumors when measured against any standard of constitutional fairness to an individual and, along with records resulting in acquittal are not entitled to any law enforcement credibility whatsoever.[73]

Despite these assertions, judges use mere arrest records in setting bail,[74] sentencing,[75] and denying probation,[76] and in determining whether a defendant's testimony is impeached by prior convictions.[77] Use of arrest records in sentencing and denying probation or by parole boards in denying parole[78] raises serious constitutional questions. In *United States v. Tucker,*[79] the Supreme Court ruled that a conviction obtained against any defendant who was not represented by counsel could not be used against that defendant either to support guilt or enhance punishment for another offense. In *United States v. Miller*[80], a district court held that the *Tucker* rule meant that any conviction obtained

69. N.M. Stat. Ann. § 28-2-1 *et seq.* (1978).
70. Loder v. Municipal Court, 17 Cal. 3d 859, 553 P.2d 624 (1976), *cert. denied,* 429 U.S. 1109 (1977).
71. *Id.* at 628.
72. *Id.* at 629.
73. 364 F. Supp. 75, 77 (E.D. Pa. 1973); *see also* Schware v. Board of Bar Examiners, 353 U.S. 232, 241 (1957).
74. Russell v. United States, 402 F.2d 185, 186-87 (D.C. Cir. 1968); Rhodes v. United States, 275 F.2d 78, 81-82 (4th Cir. 1960), *cert. denied,* 364 U.S. 912 (1969). *See also* Loder v. Municipal Court, 553 P.2d 624, 630, n.3 (1976).
75. United States v. Isaac, 299 F. Supp. 380 (D.D.C. 1969); United States v. Cifarelli, 401 F.2d 512 (2nd Cir. 1969), *cert. denied,* 393 U.S. 987 (1962); United States v. Delaney, 442 F.2d 120 (D.C. Cir. 1971); Townsend v. Burke, 334 U.S. 736 (1948).
76. People v. Peterson, 9 Cal. 3d 717, 725-26, 511 P. 1187 (1973).
77. Suggs v. U.S., 407 F.2d 1272, 1275 (D.C. Cir. 1969); Gordon v. U.S., 383 F.2d 936 (D.C. Cir. 1967). *See also* Michelson v. U.S., 355 U.S. 469 (1948).
78. Azeria v. California Adult Authority, 193 Cal. App. 2d 1, 5 (1961).
79. 404 U.S. 443, 339 (1972).
80. 361 F. Supp. 825 (W.D.N.C. 1973).

without representation by counsel could not be considered in the sentencing process.[81] The essence of the holdings in these decisions was that no presumption of guilt should be drawn from such convictions. In light of the Supreme Court's reasoning, the issue is raised whether the courts should allow examination of any arrest not resulting in conviction as part of the sentencing decision. A person arrested and subsequently dismissed before ever going to trial or found not guilty should not be subjected to harsher sentencing for a subsequent crime any more than a person convicted who was not represented by counsel.

Prosecutors also use arrest records in determining whether to charge a person, whether to plea bargain, whether to exclude a prospective juror and how to categorize the offense to be charged.[82] Thus, the exonerated arrestee will be subject to disparate treatment at this level as well.

Of these harmful uses, the exclusion of an exonerated arrestee from jury duty is the most significant. Certainly a prosecutor will not want a juror who has had any confrontation with police. This, too, raises a complex constitutional issue. If women and blacks cannot be systematically excluded from juries, it seems to follow that exonerated arrestees also should not be excluded.

The most common adverse utilization of an arrest record is by law enforcement. The most obvious use by police is that of fingerprints on the arrest card. This is a valuable investigative tool and when used with aliases, former addresses, and sometimes photographs, they can aid police in the detection of crime and protection of society.[83] The *Menard* case, however, provided a remedy whereby the competing interests of law enforcement and the individual can both be served. The fingerprints can be "neutralized" by deleting any reference to the arrest from the fingerprint card (and computers), leaving the name, aliases, and addresses on the card and placing it in the non-criminal section of the Identification Division where fingerprints and photographs for such things as passport applications, licenses, and government employment, are maintained. Thus, through "neutralization" the police still have their valuable investigative tool and the exonerated arrestee is relieved from any stigma of an arrest record.

Police also use arrest records to develop probable cause. As stated in the *Loder* case, "An arrest record may be a valuable investigative tool, as when a prior arrest is merely one of a series of arrests of the same individual on the same or related charges. Suspicion focused by such a pattern will justify additional investigation. Coupled with independent evidence of criminal involvement, it may amount to probable cause to arrest."[84] This partial development of probable cause based on arrest records[85] reverts back to the unconstitutional presumption of guilt that the courts, prosecutors and employers

81. *See also* Lipscomb v. Clark, 468 F.2d 1321 (5th Cir. 1972); Brown v. U.S., 483 F.2d 116 (4th Cir. 1973).

82. D. Newman, Conviction: The Determination of Guilt or Innocence Without Trial 116 (1966); Sledge v. Superior Court, 11 Cal. 3d 70, 75, 520 P.2d 412 (1974). (Prior narcotics arrests not resulting in conviction can be used by prosecutor in determining whether to divert into an alternate program of treatment or rehabilitation.) *See also* Goldstein, *Police Discretion not to Invoke the Criminal Process: Low Visibility Decisions in the Administration of Justice*, 69 Yale L.J. 543 (1960); Couser v. State, 282 Md. 125, 383 A.2d 389, 396 (1978); Losavio v. Mayber, 496 P.2d 1032 (Colo. 1972).

83. J. Edgar Hoover, *The Role of Identification in Law Enforcement: An Historical Adventure*, 46 St. John's Law Review 613 (1972).

84. 553 P.2d 624, 629 (1976).

85. W. La Fave, Arrest: The Decision to Take a Suspect into Custody, 287-88 (1965). It is difficult for police to draw any inferences from arrest records because a recent internal audit of F.B.I. records showed that less than 50% of arrest entries in their computer (Ident) had dispositions. Disposition Systems and Procedures - Feasibility Study, Final Report, November 11, 1976, Identification Bureau, F.B.I. (But in a recent interview C.C.H. Supervisor claimed this number was down to 27%.)

often rely upon in their decision-making process. This development of probable cause also assumes that the ability of the computerized rap sheet to document the past criminal behavior of an arrestee is accurate, when in fact, the opposite more often is true. Police and prosecutors will bring more serious charges or less serious charges against a person depending on his or her cooperation, personality, past arrest record and other factors. They are also limited to certain charging categories. Even when a person is convicted, plea bargaining often makes it unlikely that the charge at conviction reflects the nature of the criminal event. And since plea bargaining is more prevalent in urban than rural areas, the rural offender, committing the same crime as the urban offender, will probably look much worse on paper.

Finally, the *Loder* case cites some California case law which allowed prior arrests as part of the probable cause formula.[86] One must wonder how effective this procedure is in California (and elsewhere) considering that in 1962, 750,000 adults were arrested in that state, of which only 180,000 had further action taken against them.[87] In New York in 1965, 45% of persons arrested for felonies were released without charges having been filed.[88] Even the national average is not much better if conviction rates may be interpreted to reflect somewhat the existence of probable cause, for 40% of the 6 million adult arrests in 1976 resulted in no conviction.[89] Thus, it is evident that utilization of arrest records by police in the formation of probable cause has not been a successful practice. Expungement of records of arrests not resulting in conviction might even improve the quality of arrests for police would have to focus on probable cause at the time of each arrest.[90]

Another law enforcement use of arrest records is for statistical data to aid in analyzing high crime areas, patrol procedures and employment of personnel. This can be accomplished, however, without use of an arrestee's name.

The final argument raised by law enforcement for retaining criminal records is that consulting an arrest record before apprehending a person could inform the officer of a person's violent tendencies and save police lives. Recent statistics do not bear this out. In 1976, 111 police officers out of 418,000 were killed in action.[91] Most were killed in situations where neither the suspect nor his criminal record were known (*i.e.*, family quarrels and crimes in progress).[92]

In summary, the adverse effects of the use of arrest records by employers, courts, prosecutors, police, licensing agencies and a plethora of others have been well documented in studies made within the past few years. Law enforcement's need for fingerprints, statistics, photographs, aliases, and former addresses can be satisfied by neutralizing the arrest record. This in turn would

86. 553 P.2d 624, 629 (1976).
87. Cal. Bureau of Criminal Statistics, *Crime in California*, 1962, 47, 53, 75, 85 (1963).
88. Governor Nelson Rockefeller's Conference on Crime 23 (1966).
89. Federal Bureau of Investigation, Uniform Crime Reports 1976 at 215 (1977).
90. Expert testimony discussing arrest propensities because of probable cause based on arrest records can be found in Gregory v. Litton Systems, 316 F. Supp. 401 (C.D. Cal. 1970), *modified*, 472 F.2d 631 (9th Cir. 1972). The testimony indicated that a person arrested once tends to accumulate additional arrests. The lifetime average for a white male is 7 arrests, and for a black male, 12.5.
91. *Supra* note 89, at 288.
92. *Id.* at 288, 290.

also remove the proven damaging effects on the innocent arrestee. Adverse action taken against an individual by police, prosecutors, and the courts is based on certain assumptions regarding the meaning of the arrest. In so far as these assumptions and presumptions differ from reality because of the cryptic, misleading information contained on the rap sheet due to prosecutorial discretion in charging arrestees, the adverse action will have an erroneous basis.

Use by the courts of arrest records in denying probation and in sentencing may well be an unconstitutional practice in light of *Tucker* and *Miller*. The American Bar Association's Advisory Committee on Sentencing and Review has strongly recommended the exclusion, from pre-sentencing reports to be used in sentencing and probation, of any mention of arrests not leading to conviction.[93] Thus, it appears that the uses of arrest records which have been a stumbling block to millions of Americans are either ineffective, unconstitutional or can be accommodated by neutralization without harming the individual and without depriving police of an investigative tool.

CONCLUSION

In attempting to solve the arrest record problem, the legislatures, Congress, and the courts have tried to reconcile the competing interests involved by limiting dissemination. The result has been a failure to put controls on the numerous criminal record data banks. This failure stems from inherent problems within the system itself. First, there are 15,000 authorized recipients of F.B.I. records alone, who combined with those who have legal and illegal[94] access to the 10,000 state and local law enforcement agencies' data banks (Massachusetts alone has 150 authorized recipients of their state criminal record data) make the scope of the problem immense. The problem lies in the F.B.I.'s "property" concept regarding the criminal data stored in their central repository. Although the state which owns the property (criminal record) may have a statute prohibiting release of this data to anyone but police, if another state has a statute authorizing access to F.B.I. records, the latter statute will control and the record will be sent.

The unwieldly number of recipients creates the related problem of security. It is virtually impossible for the F.B.I. to oversee state and local criminal record computers or even their own, despite heavy sanctions for illegal dissemination. In the 50 years the F.B.I. has been collecting arrest records, only six cases of violations have ever been reported with punishment ranging from two weeks to one year of restricted use of F.B.I. criminal records.[95] Restricted dissemination has not protected the privacy of exonerated arrestees.

The system of labeling and grouping arrest records not resulting in conviction as "criminal records" often results in exonerated arrestees being treated and acting as criminals. The disasterous effects of an arrest record on employment opportunities have been discussed above. Use of arrest records by police as

93. Advisory Comm. on Sentencing and Review, ABA Project on Standards for Criminal Justice, Standards Relating to Probation § 2.3 at 37 (1970).
94. *See, e.g., Security & Privacy of Criminal Arrest Records: Hearings on H.R. 13315, Before Subcomm. No. 4 of the House Comm. on the Judiciary*, 92d Cong., 2d Sess. 173 (1972).
95. S. Ungar, F.B.I. 622-24 (1976).

an investigative tool or for partial development of probable cause has resulted in low quality arrests which result in a low conviction rate and waste of time by police, prosecutors, and the courts. Use of arrest records by the courts in denying probation and in sentencing raises grave constitutional questions. The arrestee is personally affected in licensing, credit, schooling, jury duty and being a witness, particularly in his own defense at a criminal trial.

The federal courts have generally narrowed expungement relief in absence of statute to situations involving mass arrests or unconstitutional arrests. Obtaining this relief is time-consuming and costly to the exonerated arrestee. Although numerous proposals for regulation of criminal justice data banks with mild expungement clauses attached have been introduced in Congress, none have been enacted into law.

Few states have actual expungement statutes and those that do, place unnecessary conditions to be met for those seeking this remedy. Because many of these statutes are poorly drafted, plaintiffs must engage in costly, time-consuming litigation regarding definitions of "expungement." And while there is a certain value and necessity in flexibility in statutory draftmanship, unfortunately, in this area, the gaps have been filled with state court rulings unfavorable to the exonerated arrestee.

The Task Force Report on Science & Technology of the President's Commission on Law Enforcement and the Administration of Justice concluded that the retention of records of arrest or conviction for unreasonable lengths of time may interfere with rehabilitation goals.[96] Dealing specifically with arrest records, the committee noted three serious problems in their use:

(1) The record may contain incomplete or incorrect information.
(2) The information may fall into the wrong hands and may be used to intimidate or embarrass.
(3) The information may be retained long after it has lost its usefulness and serves only to harass the ex-offenders or its mere existence may diminish an offender's belief in the possibility of redemption.

There exists, therefore, a serious need for federal remedial legislation. While enforcement of criminal law and operation of criminal justice information systems are primarily the responsibility of state or local government, a federal statute is appropriate because of the failure of most states to provide significant relief in this area. A corrective statute could be enacted by Congress by:

(1) Placing reasonable conditions on the grant of federal money or receipt of federal services (both of which are received by virtually all state and local criminal justice agencies).
(2) Legislating under the commerce powers.
(3) Regulating the use of the means of interstate communication.
(4) Enforcing the Due Process and Equal Protection clauses of the fourteenth amendment.

96. President's Commission on Law Enforcement and Administration of Justice Report, The Challenge of Crime in a Free Society 74-77 (1967).

Such legislation should not ignore legitimate needs for effective law enforcement. These needs can be met adequately by allowing for the retention of the fingerprint cards and photographs of arrestees, as long as they are kept in the "neutral" files of both the F.B.I. Identification Division and various state and local agencies and removing all traces of arrest from the card. Thus, the fingerprints, photographs, addresses, aliases, birth date, sex, and other "investigative tools" would be available for law enforcement use but not for the basis of an inference of guilt of an exonerated arrestee.

The administrative costs of the expungement procedure can be kept at a minimum by expunging (neutralizing the fingerprint card and photograph and erasing the arrest from all automated or manual records) arrests not resulting in conviction when an inquiry is made by an authorized recipient before sending the criminal record to the recipient. This avoids any hiring of extra employees to search through the 23 million individual criminal records to find arrests with no convictions. Alternatively, or in conjunction with the above process, the exonerated arrestee may pay the $5.00 fee currently charged to have access and review of his record, and upon retrieval, but before sending, the F.B.I., state and local agencies can expunge it, again avoiding the need for extra personnel and wasteful duplication of effort. While this does not expunge all arrests not resulting in conviction, there is no harm to those persons whose records are not consulted by police or disseminated to employers.

For most of those arrested and not convicted, too poor, too ignorant of their rights or too disheartened to complain, the time is ripe for relief and release from the living conditions of the "records prison." Certainly, as one Texas court stated, "[E]xpungement of arrest records is truly a legislative matter that should be dealt with by Congress, and this court is hopeful that it will be."[97]

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97. United States v. Singleton, 442 F. Supp. 722, 724 (S.D. Tex. 1977).

APPENDIX

STATE EXPUNGEMENT STATUTES

The following chart is a current survey (April, 1979) of state expungement statutes. "Brief description/limitations" refers to capsulized summaries of State Supreme Court interpretations of the statute. Most of the statutes are silent or unclear as to which law enforcement agencies (federal, state, local) are to perform what tasks (expunge, seal, etc.). Additional information was obtained by interview.

Key to Symbols/Abbreviations

* = If a statute only requires return of fingerprints/photos, such return from the F.B.I. automatically expunges that arrest from all F.B.I. records (computerized, manual, and alphabetically indexed) regardless of the statute or court rulings prohibiting expungement. The F.B.I. will not maintain any record of arrest for which there is no accompanying fingerprint card. State/local record not expunged.

** = If a state has a sealing statute, the usual practice is that the state notifies the F.B.I. of the sealing. The F.B.I. then returns the fingerprints/photos to the arresting police and expunges the arrest from the F.B.I. records and computers, regardless of statutory or judicial limits to sealing and prohibitions against expungement. The F.B.I. has no sealed records, but state/local do.

St. A.G.O. = State Attorney General Opinion regarding the statute (not legally binding).

Fpts./photos = Fingerprints and photographs of arrestee

nolle prosse = nolle prosequi (unwilling to prosecute)

State & Statute	1	2	3	4	5	Description/Limitations
Alabama *Ala. Code* § 41-9-625 (1975)	1	2				Anyone "cleared" of arrest or released without charge has all information "eliminated" and "removed."
Alaska *Alaska Rev. Stat.* § 12-62-040 (1972)						Though statute refers to "purging" criminal records, such "removal" is at the discretion of the Governor's Commission on the Admin. of Justice.
Arizona *Ariz. Rev. Stat. Ann.* § 13-4051 (1978)	1	2**	3		5	Arrestee petitions court to clear record if arrestee "wrongfully arrested". If petition granted, state records are sealed. Released only with court order (except police). *Beasley v. Glenn,* 110 Az. 438, 520 P.2d 310 (1974) held no destruction.
Arkansas *Ark. Stat. Ann.* § 43-1231 *et seq.* (1975)	1	2		4	5	No statute for expungement of non-conviction records. Expungement statute applies only to convicted first offenders whose sentence is probation. Can be used only once. Must have no prior convictions. Sealed records available only to police and judiciary. Convicted may say never convicted to employers, licensors, permit grantors.
California *Cal. Penal Code* § 849.5 (1975) § 851.6 (1970) § 851.8 (1975)	1	2				State Bureau of Criminal Identification began expungement program in 1974 whereby all misdemeanor arrests not resulting in conviction and "detentions" are automatically expunged from all law enforcement agency records, 5 years from date of arrest if no arrests during the waiting period. All felony arrests not resulting in conviction and all misdemeanor convictions are expunged after 7 year waiting period. An arrest during the waiting period starts waiting period over again. 849.5 Defines "detention" as an arrest without a warrant where no accusatory pleading is filed. 851.6 Says "detention" is not an arrest so the arrest record must be termed "detention record." This still appears on state rap sheet, but not on F.B.I. record. 851.8 If defendant acquitted and court deems person is actually innocent, court may order the record sealed.
Colorado						NONE LOCATED
Connecticut *Conn. Gen. Stat. Ann.* § 54-142(a) *et seq.* (1978)	1	2			5	Although 54-142(a) (9) specifically says upon favorable disposition to arrestee all records are automatically "erased"; in practice, F.B.I. record is expunged, but state/local police and court records are sealed. Sealed records are disclosed to anyone authorized by statute to receive this data.
Delaware						NONE LOCATED
Florida *Fla. Stat. Ann.* § 901.33 (1977)	1	2	3	4	5	Confidential computerized record maintained by state police, with only law enforcement having access to it. *State v. Zawistowski,* 339 So.2d 315 (1976), held that no prior conviction rule bars expungement of arrests occurring after the conviction only, arrests before the conviction are expungable.

1. F.B.I. Fpts. & Photos Returned/Destroyed
2. F.B.I. Arrest Rec. Expunged
3. Arrestee Must Petition Court
4. No Prior Convictions
5. State Records Sealed – Not Expunged

State & Statute	1	2	3	4	5	Description/Limitations
Georgia						NONE LOCATED
Hawaii *Hawaii Rev. Stat.* § 831-3.1 *et seq.* (1974)	1	2**		4	5	Exonerated arrestee applies to State Attorney General for fingerprints to be returned. State records are sealed and available to the courts for sentencing and to the Federal Government for jobs affecting national security. Persons may say never arrested.
Idaho *Idaho Code* § 19-4813(1) (1974)	1	2*	3			"Fingerprint Record" returned to unconvicted arrestee upon judicial order.
Illinois *Ill. Ann. Stat.* § 38-206-5 (1975)	1	2*	3	4		*People v. Glisson,* 69 Il. 2d 502, 372 N.E. 2d 669 (1978) held that an arrestee is entitled to return of fingerprints and photos for any arrest not resulting in conviction, but no expungement if arrestee has prior conviction. Same case ruled that a pardon still bars both expungement and fpt. return. Arrestee must petition court for either remedy (fingerprint return or expungement).
Indiana *Ind. Ann. Stat.* § 35-4-8-1 (1977)	1	2*		4		Arrestee, in writing, demands police to expunge, return fingerprints and photos. Available only if no charges preferred, dismissal due to mistaken identity, no probable cause for arrest found by court, or no offense in fact having been committed. Arrestee must have no prior convictions or arrests. Must not have any pending charges. Statute is silent on other dispositions (nolle prosse, not guilty, etc.).
Iowa *Iowa Code Ann.* § 749.2 (1939) § 602.15 (1975)	1	2*		4	5	Although § 749.2 specifically allows for destruction of exonerated arrestee's fingerprints if no prior convictions, Iowa Supreme Court ruled no expungement of arrest record (*State v. Fish,* 265 N.W. 2d 737 (1978)). § 602.15 allows expungement of court records.
Kansas *Kansas Stat. Ann.* § 21-4619 (1978) § 12-4516 (1978)	1	2	3		5	No expungement statute for exonerated arrestee. Expungement remedy in cited statute is annulment of a conviction. F.B.I. record is expunged, state record sealed. Person may say never convicted. Convict must wait 2 years from release date for this relief if convicted of a misdemeanor or certain felonies, 5 years for other felonies. Must not have any felony conviction during waiting period and must not have any pending criminal prosecution. "Expunged" conviction can't be used against person in licensing or employment (except in employment as a private detective or private patrol); but can be used for sentencing for another crime. Dissemination of this record is limited.
Kentucky *Ky. Rev. Stat. Ann.* § 17.110 (1958) § 433.234(2) (1974)						§ 17.110 says police can take fingerprints for felony arrests only, but State Att'y Gen'l. Opinion says applicable to misdemeanor arrests also. § 433.234 says send fingerprints and record of shoplifting arrestee to State Criminal Identification Bureau only if convicted.

1. F.B.I. Fpts. & Photos Returned/Destroyed
2. F.B.I. Arrest Rec. Expunged
3. Arrestee Must Petition Court
4. No Prior Convictions
5. State Records Sealed – Not Expunged

State & Statute	1	2	3	4	5	Description/Limitations
Louisiana *La. Rev. Stat. Ann.* § 44:9 (1970) *Code of Crim. Pro. Article 894 (1972)*	1	2	3			Any exonerated arrestee, upon motion to court, can have arrest record destroyed by all law enforcement agencies who have it. Fingerprints and photos also destroyed. Expungement order kept by arresting police under lock and key for internal record keeping purposes and to preserve integrity of the expunging agency. Can't be used for investigative or any other purposes. Art. § 894 provides above expungement relief to those convicted of misdemeanors who receive a suspended sentence or probation. Must have no convictions during probation period. Conviction can be used against person as a habitual offender, and this statute can be used only once every 5 years. Though F.B.I. record is expunged, state police keep confidential record for 2 limited purposes (habitual offender & use once every 5 years).
Maine						NONE LOCATED
Maryland *Md. Ann. Code* § 27-735, 737 (1975)	1	2	3			Expungement defined as removal of criminal record from public inspection. In practice, it is expunged from all files. Arrestee must wait three years for this relief if disposition of case was other than acquittal or dismissal. (*Ward v. State*, 37 Md. App. 34, 375 A. 2d 41 (1977) held a nolle prosse disposition requires three year wait.) No waiting period if conviction reversed. Must have no convictions during three year waiting period and no pending criminal prosecution. No fee to arrestee for this remedy.
Massachusetts *Mass. Gen. Laws Ann.* § 276 § 100(C) (1973) § 276 §100(A) (1971)	1	2		4	5	276 § 100(C) Court and police records are sealed if arrestee found not guilty or if the court finds no probable cause for the arrest. Any other exonerating disposition (nolle prosse, dismissal, etc.) requires court finding it to be in the best interests of justice to seal. Arrestee makes sealing request to probation commissioner. Any inquiries other than by police or courts will be told person has no record. Courts do not have access to records with "not guilty" dispositions or records of arrest where no probable cause found. 276 § 100(A) Provides sealing of conviction records (court and police) after waiting period (15 years from end of sentence for felony, 10 years for misdemeanor). Must have no prior convictions and no arrests during waiting period. An arrest during waiting period starts period over again. Person can say never arrested or convicted, but record can be used in sentencing and by police. Can also be used to deny license to sell or carry guns. (*Rzeznik v. Chief of Police*, 373 N.E. 2d 1128 (1978)).
Michigan *Mich. Com. Laws Ann.* § 28.243 (1958)	1	2		4		Statute provides for automatic expungement and fingerprint return. Must have no prior convictions. If arrested for certain child sex offenses and subsequently exonerated, then judge must order expungement – not automatic in these cases.

1. F.B.I. Fpts. & Photos Returned/Destroyed
2. F.B.I. Arrest Rec. Expunged
3. Arrestee Must Petition Court
4. No Prior Convictions
5. State Records Sealed – Not Expunged

State & Statute	1	2	3	4	5	Description/Limitations
Minnesota *Minn. Stat. Ann.* § 299c.11 (1957) § 638.02 (1974)	1	2		4		299c.11 Provides for return of fingerprints to defendant with any favorable disposition. Must make request to police and must have no felony convictions in past 10 years. *In re R.L.F.*, 256 N.W. 2d 803 (1977) held arrest records also expunged. 638.02 provides annulment of conviction and sealing of records upon receipt of pardon.
Mississippi						NONE LOCATED
Missouri *Mo. Ann. Stat.* § 610.100 (1973) § 610.105 (1973) § 610.110 (1973)	1	2**			5	610.100 If arrestee not formally charged 30 days from arrest, arrest record "closed" to all except him for a year. If no conviction in that year, it is automatically expunged. Available only in a city or county with population of 500,000 or more. (But only two counties meet this condition, so only their records are expunged.) All other counties "close" their records, and are accessible only to arrestee and police. Records stamped "closed" in state files; and F.B.I. usually expunges. 610.105 Applies to all counties. Nolle prosse, dismissal, not guilty dispositions "closed". These "closed" records open to no one except arrestee and police. No expungement of these records from state files. 610.110 Can say never arrested if record expunged. 1973 St. A.G.O. said statute not retroactive – only 1973 arrests and forward are expunged. 1973 St. A.G.O. said expunge means destroyed. 1974 St. A.G.O. said expungement not available to reversed convictions, even if found not guilty on remand. 1977 St. A.G.O. said pardon does not entitle arrestee to expungement.
Montana *Mont. Rev. Codes Ann.* § 80-2003 (1965)	1	2*				Statute allows for destruction of fingerprints and other information upon a finding of innocence of felony charge.
Nebraska						NONE LOCATED
Nevada *Nev. Rev. Stat.* § 179.245 (1971) § 179.255 (1971) § 179.285 (1971) § 179.295 (1971)	1	2**	3		5	179.255 Provides for sealing of arrest records 30 days after dismissal or acquittal, upon arrestee's petition to court. 179.245 Provides for sealing conviction records 15 years after date of felony conviction or release from prison, 10 years for gross misdemeanor, 5 years for other misdemeanors. Must have no arrests during waiting period. Convicted must petition court. Court records are also sealed along with F.B.I. and state fingerprint cards and photos, thus expunging the F.B.I. record. 179.285 Provides that those who are granted expungement pursuant to either of the above statutes may treat the arrest/conviction as never having occurred. 179.295 Says that records are sealed to all except arrestee, or, if arrestee dismissed and arrested again on a similar charge, prosecution can open sealed records if arrestee will be brought to trial.

1. F.B.I. Fpts. & Photos Returned/Destroyed
2. F.B.I. Arrest Rec. Expunged
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New Hampshire *N.H. Stat. Ann.* § 593.4 (1915) § 651.5 (1971)						593.4 Provides for destruction of fpts./photos to exonerated arrestee, but state police say not applicable to criminal records. 651.5 If person sentenced to probation or conditional discharge, he may petition court to annul conviction. 2 year waiting period (with no convictions during) for those receiving conditional disch. Can be used in sentencing for another crime, but person can answer "never convicted or arrested for a crime not annulled by a court" (employers, licensors, etc., must couch question in those terms). Misdemeanor to disclose a person's annulled conviction record. This section providing annulment is not available if sentenced to prison.
New Jersey *N.J. Stat. Ann.* § 2A: 85-15 *et seq.* (1973) § 2A: 164-28 (1975)	1	2	3	4		2A: 85-15 *et seq.* Provide for expungement (defined as "sealing") of misdemeanor arrest records not resulting in conviction. N.J. Supreme Court ruled statute also applied to felonies (*State v. E.B.R.*, 139 N.J. Super. 166, 353 A.2d 118 (1976)). Arrestee must petition court and pay court costs. Expungement not a right but is discretionary. Though statute says expunged record released to no one for any reason, N.J. Supreme Court ruled records could be released to a defendant in a false arrest or malicious prosecution case (*Ulinsky v. Avignone*,148 N.J. Super. 250, 372 A.2d 620 (1977)). Grounds for denying expungement: usefulness to police outweighs disabilities of arrest to arrestee, dismissal due to plea bargain or exclusionary rule. Effect of sealing is that arrestee can treat arrest as never having occurred. 2A: 164-28 Expungement of conviction 10 years from conviction date or release (whichever later) if no subsequent convictions. Not available for certain offenses. Procedure same as 2A: 85-15.
New Mexico *N.M. Stat. Ann.* § 28-2-1 *et seq.* (1978) § 29-10-1 *et seq.* (1978)						28-2-1 *et seq.* Entitled *"Criminal Offender Employment Act"*, statute prohibits dissemination of records of arrest not followed by conviction to public/private employers (except law enforcement agency employers), licensors, etc. § 29-10-1 *et seq.* Makes it felony to disseminate non-conviction data to anyone but law enforcement and judiciary. Pardoned offenses included.
New York *N.Y. Crim. Proc.* § 106.50 *et seq.* (1976)	1	2*	3		5	Statute provides for sealing records, fingerprint cards, photos from F.B.I., state/local police if defendant receives any favorable disposition. Not available if prosecutor proves not in best interests of justice to seal or if a criminal charge is pending. Statute also applies to arrests before this legislation. This statute not applicable to marijuana offense (which has its own sealing statute expunging arrests & convictions after 3 year waiting period). Sealed record available to: prosecution in marijuana cases, police on ex parte motion, state/local agencies giving gun licenses. Court records (excluding published opinions or decisions on appeal) are also sealed.

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North Carolina *N.C. Gen. Stat.* § 90-96 (1977)						"Expunction" means annulment of conviction. Available only for drug possession conviction. Sentence must be probation, have no prior convictions, and this relief available only once.
North Dakota						NONE LOCATED
Ohio *Ohio Rev. Code Ann.* § 2953.31 (1977) § 109.60 (1977)	1	2*				109.60 Provides for automatic return by State Crim. I.D. Bureau of fingerprints upon acquittal or nolle prosse of felony. Statute silent on expungement and misdemeanors. 2953.31 *et seq.* Conviction sealed after waiting period (3 years felony-1 year misdemeanor) if no priors, no pending crim. prosecutions, and court feels convict rehabilitated. Record is sealed and employers can't inquire about expunged conviction unless it has relationship to that position. However, expunged conviction can be used in sentencing for subsequent offenses and impeachment.
Oklahoma						NONE LOCATED
Oregon *Ore. Rev. Stat.* § 137.555(3) (1975) § 137.225 (1977)						181.555 Inaccurate or incomplete arrest, charge, or disposition information is purged or expunged. Statute silent on non-conviction records. 137.225 Certain convictions annulled and sealed 3 years from conviction date upon motion by convicted. Must have no convictions during waiting period. Person can answer "never convicted."
Pennsylvania *Pa. Stat. Ann.* § 19-1405(c) (1935)						District Attorney to destroy fingerprints of persons acquitted. In *Commonwealth v. Magaziner,* 50 Pa. D. & C.2d 291 (1970), grand jury dismissed adultery charges against defendant but court held no expungement of state, local, or F.B.I. arrest records or fingerprints. The court also ruled that § 1405 not applicable to nolle prosse or dismissal. *Commonwealth v. Homison,* 385 A.2d 443 (1978), held expungement not available for pardoned offenses. *Commonwealth v. Malone,* 366 A.2d 584, 587 (1976) held no destruction of state or F.B.I. fingerprints or arrest records; only prints of D.A. to be destroyed. Thus no expungement statute in Pa.
Rhode Island *R.I. Gen. Laws* § 12-1-11 (1974) § 12-1-12 (1975) § 12-1-13 (1976)	1	2*		4		12-1-11 Authorizes fingerprints/photos taken only of those charged and convicted. 12-1-12 Mandatory and automatic destruction of fingerprints/photos of exonerated arrestee if no priors. 12-1-13 Expungement of misdemeanor convictions if: 5 years after sentenced served, no convictions in those 5 years, original charge was not a felony and pleaded down, no prior felony convictions. F.B.I. records also expunged.
South Carolina *S.C. Code* § 17-1-40 (1976)	1	2				Upon any favorable disposition to arrestee, all records (fingerprints, arrest records, etc.) kept by any law enforcement agency destroyed.

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South Dakota						NONE LOCATED
Tennessee *Tenn. Code Ann.* § 40-4001 (1973) § 40-2109 (1976)	1	2	3			40-4001 All public records where arrestee exonerated, removed and destroyed upon petition to court, without cost to petitioner. However, arrestee in diversion program who is dismissed later, pays costs. 40-2109 Nolle prosse entitled to expungement upon petition to court.
Texas *Tex. Crim. Pro. Ann.* § 55.01 *et seq.* (1977)	1	2	3	4		If arrestee not formally charged or charge dismissed, upon petition to court arrestee has right to expungement of F.B.I., state/local records if no prior felony conviction in past 5 years.
Utah *Utah Code Ann.* § 77-35-17.5(1) (1975) § 77-37-17.5(2) (1973)	1	2	3		5	(1) Applies to convictions. Expungement of felony & class A misdemeanor conviction 5 yrs. after release (1 year for other misdemeanors) if no convictions in waiting period, no pending prosecution, and court feels petitioner is rehabilitated. Can treat conviction as never having occurred. These records sealed. (2) Applies expungement to exonerated arrestees upon petition to court if no arrests during 12 month waiting period. Also applies to arrests before this statute enacted. F.B.I. records expunged, but state/local criminal & court records sealed; access only to arrestee.
Vermont						NONE LOCATED
Virginia *Va. Code Ann.* § 19.2-392.2 *et seq.* (1977)	1	2**	3		5	Exonerated arrestee petitions court to expunge (seal) police & court records. This is discretionary and not a right. Access to sealed record by ex parte order without notice to arrestee, for employment in law enforcement, or to D.A. & police for pending criminal investigation. But above can just look at the record; no copies made. Statute makes it misdemeanor for employer, educational institutional, state/local government employers/licensors to ask about expunged arrest record.
Washington *Wash. Rev. Code Ann.* § 10.97.060 (1977)	1	2		4		"Deletion" of non-conviction data upon favorable disposition to arrestee, 2 years after disposition, if no prior felony or gross misdemeanor convictions, no pending prosecution, no arrests during 2 year waiting period. Person requests police to delete data. This relief not available to arrestees in diversion program.
West Virginia *W. Va. Code Ann.* § 15-2-24(h) (1977)	1	2*		4		All persons acquitted, if no prior convictions, request State Bureau of Crim. Ident. for fingerprints/photos to be returned.
Wyoming *Wyo. Stat. Ann.* § 9-2-568 (1973)						Access to criminal records limited to law enforcement agencies only.
Wisconson						NONE LOCATED

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